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No. 92-542

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

STATE OF CALIFORNIA,

Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF RIVERSIDE, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal For The State Of California, Fourth Appellate District

RESPONDENT *NEWMAN* COORDINATING COMMITTEE'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court review a California intermediate appellate court decision giving collateral estoppel effect to federal court findings where the decision:

   a. rests upon an independent state law ground, and therefore raises no substantial federal question;

   b. is interlocutory, does not finally resolve the litigation and can be reviewed by this Court if necessary and appropriate when and if a final judgment is entered;

   c. is unpublished and under California law may not be cited as precedent; and

   d. is correct on independent grounds not disclosed by the Petition and therefore would have to be affirmed in any event?

2. Should the Court review Petitioner's *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) contention where it was not litigated or decided below and does not apply in any event because the federal court findings were not made in a diversity case and were made under federal law?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

REASONS FOR DENYING THE WRIT 4

I. THE DECISION RESTS ON AN INDEPENDENT STATE LAW GROUND 4

II. THE CASE DOES NOT PRESENT THE ISSUE PETITIONER CLAIMS 8

III. THE COURT OF APPEAL'S DECISION IS NOT FINAL 11

IV. THE DECISION IS OF INTEREST ONLY TO THE PARTIES 13

V. THERE IS NO REASON TO GRANT THE WRIT 14

A. No Conflict With A Decision Of This Court 14

B. No Conflict In The Circuits To Review Here 15

C. No *Erie v. Tompkins* Issue To Review 16

VI. THE COURT OF APPEAL'S DECISION IS SOUND IN ANY EVENT 17

CONCLUSION 22

RULE 29.1 LIST (APPENDIX A) A-1

TABLE OF AUTHORITIES

Page

CASES

Ake v. Oklahoma, 470 U.S. 68 (1985) 7

Allen v. McCurry, 449 U.S. 90 (1980) 20

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 16

Bates v. Union Oil Company of California, 944 F.2d 647 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1761 (1992) 18

Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987) 16

Clark v. Jeter, 486 U.S. 456 (1988) 16

Costantini v. Transworld Airlines, 681 F.2d 1199 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982) 18

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 12

Dupasseur v. Rochereau, 21 Wall. (88 U.S.) 130 (1875) 6, 7, 15

Empire Fire & Marine Ins. Co. v. J. Transport, 880 F.2d 1291 (11th Cir. 1989) 17

Erie R.R. v. Tompkins, 304 U.S. 64 (1938) 16

Flynt v. Ohio, 451 U.S. 619 (1981) 11

Gelb v. Royal Globe Insurance Co., 798 F.2d 38 (2d Cir. 1986) (dictum), *cert. denied*, 480 U.S. 948 (1987) 18

Hanna v. Plumer, 380 U.S. 460 (1965) 10

In re Air Crash at Dallas/Fort Worth Airport, 861 F.2d 814 (5th Cir. 1988) 18

TABLE OF AUTHORITIES – Continued

Page

International Longshoremen's Assn. v. Davis, 476 U.S. 380 (1986) 7, 11

Johnson v. SCA Disposal Services, 931 F.2d 970 (1st Cir. 1991) 18

Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387 (1923) 13

Levy v. Cohen, 561 P.2d 252 (Cal.), *cert. denied*, 434 U.S. 833 (1977), *cert. denied*, 459 U.S. 1087 (1982) 18

Market Street Ry. Co. v. Railroad Comm'n, 324 U.S. 548 (1945) 11, 12

Martin v. Martin, 470 P.2d 662 (Cal. 1970) 5, 9

Michigan v. Long, 463 U.S. 1032 (1983) 7

North Dakota Pharmacy Bd. v. Snyder's Drug Stores, 414 U.S. 156 (1973) 11

O'Dell v. Espinoza, 456 U.S. 430 (1981) 12

Petromanagement Corp. v. Acme-Thomas Joint Venture, 835 F.2d 1329 (10th Cir. 1988) 18

Producers Dairy Delivery Co. v. Sentry Ins. Co., 718 P.2d 920 (Cal. 1986) 8

Radio Station WOW v. Johnson, 326 U.S. 120 (1945) 11

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 13

Shoup v. Bell & Howell Co., 872 F.2d 1178 (4th Cir. 1989) 18

Silcox v. United Trucking Service, Inc., 687 F.2d 848 (6th Cir. 1982) 18

Stoll v. Gottlieb, 305 U.S. 165 (1938) 6, 9, 14, 15

TABLE OF AUTHORITIES – Continued

Page

Terrell v. Morris, 493 U.S. 1 (1989) 14

United States v. Montrose Chemical Corp., 788 F. Supp. 1485 (C.D. Cal. 1992) 20

Younger v. Jensen, 605 P.2d 813 (Cal. 1980) 18

STATUTES

28 U.S.C. § 1257(a) 1, 4, 11

28 U.S.C. § 1291 2

28 U.S.C. § 1292(b) 2, 14

42 U.S.C. § 9601(20)(D) 9

42 U.S.C. § 9613(b) 10

California Rule of Court 976(b) 13

California Rule of Court 977(a) 14

Supreme Court Rule 10 13

MISCELLANEOUS

12 James W. Moore et al., *Moore's Federal Practice* ¶ 511.01 (1990) 7

1B James W. Moore, et al., *Moore's Federal Practice*, ¶ 0.410[1] (1992) 19

Stuart D. Smith, Note, *Erie and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505 (1985) 17

18 Charles A. Wright, et al., *Federal Practice & Procedure*, § 4472 (1981) 19

TABLE OF AUTHORITIES – Continued

Page

18 Charles A. Wright, et al., *Federal Practice & Procedure* § 4433 (1981) 21

Charles A. Wright, *Law of Federal Courts* § 100A (4th ed. 1983) 17

Restatement (Second) of Judgments § 87 (1982)...18, 19

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RESPONDENT *NEWMAN* COORDINATING COMMITTEE'S BRIEF IN OPPOSITION

JURISDICTION

The decision below is not a final judgment or decree under 28 U.S.C. § 1257(a). (pp. 11-13, below) Petitioner's rights were adjudicated under state law. (pp. 4-8, below)

STATEMENT OF THE CASE

With the following additions and corrections, Petitioner's statement of the case is adequate for the purpose of ruling on the Petition:

1. Petitioner's statement that the California Court of Appeal's decision rests on federal law and resolves a federal question, Pet. 4, 10, is inaccurate.[1] The decision is grounded on California law. (pp. 4-8, below)

2. Petitioner's statement that "[u]nder California law, the interlocutory federal order would not be entitled to preclusive effect," Pet. 4, is also incorrect. Under California law, most (but not all) interlocutory orders are not entitled to preclusive effect. But, as the court below held, interlocutory orders of federal courts ruling on state-law claims are given collateral estoppel effect based on California's policy of deference to the federal rule of finality. App. 14-17.

3. The federal district court's order is not yet appealable under 28 U.S.C. § 1291, Pet. 4, 8, but Petitioner tried to pursue an interlocutory appeal under 28 U.S.C. § 1292(b). The district court refused to certify the order.

4. Petitioner's statements regarding the two underlying actions, Pet. 5-8, are laced with inaccuracies, most of which do not affect the jurisdictional issues raised by the Petition for Certiorari. However, it is important to note that there is no diversity of citizenship jurisdiction involved here.

5. The federal court findings and orders adjudicating issues against Petitioner were made under a federal statute, CERCLA, as well as under state law. Pet. 7; (pp. 8-11, below)

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[1] The Petition for Certiorari is cited as "Pet. ___". The Appendices to the Petition are cited as "App. ___."

6. The Court of Appeal did not summarily deny Petitioner's Petition for a Peremptory Writ of Mandate. Pet. 9. Rather, the court reached the merits, holding that:

> The order in the federal action was entitled to preclusive effect. Whether to give it such effect was within the trial court's discretion, and we do not find an abuse of that discretion.

App. 30.

7. The members of the Newman Coordinating Committee, defendants below and Real Parties/Respondents here, are Alcan Aluminum Corp., The Deutsch Company, McDonnell Douglas Corp., Masco/NI Industries, Inc., Quantum Chemical Corp., formerly known as National Distillers & Chemical Corp., Montrose Chemical Corp., Northrop Corp., Quemetco, Inc., Rohr, Inc. and Rockwell International Corp.

SUMMARY OF ARGUMENT

Petitioner asks the Court to review an intermediate state court's unpublished, interlocutory decision on a question of state law. Certiorari is not remotely warranted.

First, the decision turns on state law. The court simply held that federal court findings should be given collateral estoppel effect *as a matter of state law*. The decision presents no clash of state and federal interests and no federal question that warrants this Court's review.

Second, the decision does not present the issue Petitioner claims. The federal court findings were not made

solely under state law; most of them were made as well to resolve purely federal issues under CERCLA. Even Petitioner concedes that a state properly gives collateral estoppel effect to such findings.

Third, the decision is not final. It is a pretrial ruling that this Court can review if appropriate when and if a final judgment is ever entered.

Fourth, the state court considered the decision too insignificant even to meet the standards for publication in the official reports. The decision has no precedential force; it cannot even be cited in other cases. Thus, it is of interest only to the parties.

Finally, even if it did present the questions Petitioner claims, the decision is sound. It does not conflict with any decision of this Court, and it reaches the right result. There is not even any "error" to review and correct.

The Petition should be denied.

REASONS FOR DENYING THE WRIT

I. THE DECISION RESTS ON AN INDEPENDENT STATE LAW GROUND.

Although Petitioner purports to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), nowhere does it identify either any state law that has been drawn into question or any federal right that has been infringed. The explanation for Petitioner's inability to describe any clear basis for the Court's jurisdiction is simple: the Court of Appeal merely analyzed the issue on which the federal

circuits are divided and announced *California's* policy on the issue. It held as a matter of California law that a California court should apply the general federal rule of finality for res judicata purposes. Because the decision below is grounded on California law and policy, it is not appropriate for this Court's review.

There can be no doubt that the decision below rests on a state law ground. This is how Petitioner itself stated the issue for the Court of Appeal:

> What is California's law concerning the preclusive effect of an interlocutory order, based on California law, rendered by a federal district court sitting in California?

Supplemental Traverse, p. 1. *See also*, p. 11.

Real Parties addressed that state law issue:

> [U]nder California law California courts must apply the federal rule that "a federal judgment or order once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition." *Martin v. Martin*, [470 P.2d 662, 667-68 (Cal. 1970)].

Coordinating Committee's Supplemental Return to Petition for Writ of Mandate and Memorandum of Points and Authorities, p. 15. *See also*, Plaintiff Real Parties' Supplemental Return to Petition for Writ of Mandate, p. 3 ("California courts have also consistently held that for the purpose of claim and issue preclusion in state court, a federal court judgment is *final* even before it has been tested on appeal.") (emphasis in original).

Finally, the Court of Appeal decided Petitioner's state law issue. Its holding that a federal judgment determining state law issues is entitled to collateral estoppel effect relies on California authorities, App. 14-16, and rests upon principles of *California* law:

> We can find in these authorities no indication that California would adopt a jealous rule aimed at exerting special powers over a federal court adjudication based on California law.

App. 16.

Petitioner claims that the case presents a federal issue because the court of appeal at one point poses the question of whether a federal court would apply state or federal law. Pet. 10; App. 7.[2] It is true that the court – as would any court – analyzed the existing precedent (which derives from federal cases) and determined that the better rule is found in the cases that hold that *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938) and *Dupasseur v. Rochereau*, 21 Wall. (88 U.S.) 130 (1875) are relics of another era. However, the opinion makes clear that the answer to that question makes no difference, because California would choose to give preclusive effect to the findings in any event:

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[2] Petitioner understood the state-law basis of the Court of Appeal's decision when it sought review by the California Supreme Court. Its petition explicitly recognized the Court of Appeal's declaration of California policy, and decried it as a misreading of California law and an "abdication of state sovereignty." Petition for Review 13-14, 17-18. The California Supreme Court did not find Petitioner's arguments to be persuasive.

> We therefore conclude that a federal court would look to its own law to determine the effect of the orders in question; *even if it looked to California law, the policy of this state would reflect the inquiry back to federal authority. In either case, California respects the final federal decision on the issue.*

App. 16-17 (emphasis added).

Thus, this Court's resolution of the conflict in the circuits would not change the outcome in this case. Even if *Dupasseur* were still good law and stands for the proposition Petitioner claims, it would at most permit, not compel, California to apply a different finality rule.[3] Regardless of *Dupasseur*'s fate, California, by its own policy, would hold that the federal decision was final and entitled to collateral estoppel effect.

California has chosen as a matter of its own law to give collateral estoppel effect to the federal findings. It was free to do so, and therefore its decision to do so raises no federal issue for this Court's review. *See International Longshoremen's Assn. v. Davis*, 476 U.S. 380, 387 (1986) ("we have no authority to review state determinations of purely state law."); *Michigan v. Long*, 463 U.S. 1032, 1038 n.4 (1983) ("[O]ur jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."); 12 James W. Moore

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[3] This is clear from Petitioner's statement of the question. Pet. i. Full faith and credit does not forbid California from choosing to have federal law govern. It either permits or requires a choice California has freely made. In no sense is state law dependent on resolution of the full faith and credit question. *Cf. Ake v. Oklahoma*, 470 U.S. 68, 74-75 (1985).

et al., *Moore's Federal Practice* ¶ 511.01, at 8-65 (1990) ("[I]f the state court decides only the non-federal questions, or decides both the federal and non-federal questions, the Supreme Court has no jurisdiction to review if the non-federal ground is adequate to support the judgment.").[4]

II. THE CASE DOES NOT PRESENT THE ISSUE PETITIONER CLAIMS.

Petitioner says the issue is whether federal law must be applied to "determine the preclusive effect of a prior federal order adjudicating *state law claims*." Pet. i. (emphasis added). Petitioner's intimations that the federal court findings that it was negligent were based only on state law, Pet. 4, 7, 8, 18-19, are not true. Thus, the case does not fairly present the issue Petitioner poses.

The federal court made specific findings of negligence *under federal law* when it determined that Petitioner was liable under CERCLA as an owner and operator of the Stringfellow site. These findings were necessary to

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[4] There is another independent state law ground for the decision. California gives collateral estoppel effect to a decision that is "sufficiently firm," even if an appeal is possible or pending. *See Producers Dairy Delivery Co. v. Sentry Ins. Co.*, 718 P.2d 920, 924 (Cal. 1986). The findings here were made after a 37-day trial. They were reviewed by the Special Master and again, independently, by the district court, which found the evidence against Petitioner "overwhelming." They were sufficiently firm to be given preclusive effect. In fact, the Court of Appeal specifically found them "sufficiently firm" under the Restatement and federal law. App. 18-20. Since California follows the same standards, they were also "sufficiently firm" under California law. That is another reason why this Court should deny the Petition.

defeat the Petitioner's assertion that it should be considered an "involuntary" owner or operator exempted from liability under CERCLA § 101(20)(D), 42 U.S.C. § 9601(20)(D). As the Special Master explained:

> Even if the State were considered an "involuntary" owner or operator of the facility (see § 101(20)(D)) its liability is unaffected since the State caused and contributed to a release and a threatened release of a hazardous substance from the facility both before and after it became the owner operator, including but not limited to its negligence in (i) investigating the site, (ii) choosing the site, (iii) designing the site, (iv) supervising construction of the site, (v) delaying taking cleanup activities at the site and (vi) failing to remedy conditions at the site.

State Petition Ex. 18 and Ex. H at 4-5.

These findings, made under federal law, resolve six of the nine issues on which the California courts granted collateral estoppel. Pet. 8, issues a through f. Since they were made under federal law, it is undisputed that they are entitled to collateral estoppel effect measured by federal law regardless of what law measures the effect of the findings made under the pendent state law claims. *See Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938); *Martin v. Martin*, 470 P.2d 662, 667-68 (Cal. 1970). Therefore, even if it were correct that California was somehow forbidden from choosing to apply the usual federal preclusion rule to federal findings made on state law claims,[5] Petitioner

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[5] Of course that is not correct. Even if California were not bound to apply the federal preclusion rule, it was not forbidden

would still be collaterally estopped by the six findings that were also made under federal law.

Moreover, jurisdiction over the Petitioner's state-law claims and the defendants' state-law counterclaims is pendent to the exclusive federal jurisdiction of the CERCLA claims. See CERCLA § 113(b), 42 U.S.C. § 9613(b). This is not a diversity case, and therefore would present a far different issue from that presented in the debate between federal courts regarding the res judicata effect of a federal court sitting in diversity. Specifically, application of "the twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), will obviously be different here, where federal jurisdiction over the CERCLA claims is exclusive and the issue of forum shopping could not have arisen.[6] It does not appear that *any* federal circuit court has spoken on the issue of the res judicata effect of claims pendent to exclusively federal claims.

The net result is that the case is different from and more complicated than the one Petitioner describes. Petitioner is asking the Court to render an opinion on a question that is not fairly presented and that does not substantially affect the ultimate decision. This Court would have to affirm most of the collateral estoppel

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from doing so. As shown above, California voluntarily chose to apply that rule as a matter of California law, and there is no basis for second-guessing that choice. (pp. 4-8, above)

[6] Petitioner's facile equation of diversity to pendent jurisdiction (Pet. 15 n. 6) is not to the point and is based on a miscitation.

rulings (for reasons Petitioner chose not to disclose) even if Petitioner's proposed issue were resolved in its favor. That would not be a wise use of this Court's time and resources. *See International Longshoremen's Assn. v. Davis*, 476 U.S. 380, 387 (1986) ("Nor do we review federal issues that can have no effect on the state court's judgment.") (dictum).

III. THE COURT OF APPEAL'S DECISION IS NOT FINAL.

This Court reviews only *final* judgments or decrees of state courts of last resort. 28 U.S.C. § 1257(a). This means that the state court judgment "must be subject to no further review or correction in any other state tribunal; *it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein.* It must be the final word of a final court." *Market Street Ry. Co. v. Railroad Comm'n*, 324 U.S. 548, 551 (1945) (emphasis added). The finality rule is designed to avoid the "mischief of economic waste and delayed justice," *North Dakota Pharmacy Bd. v. Snyder's Drug Stores*, 414 U.S. 156, 159 (1973) (quoting *Radio Station WOW v. Johnson*, 326 U.S. 120, 124 (1945), that results from "piecemeal review." *Flynt v. Ohio*, 451 U.S. 619, 621 (1981). Moreover, "[t]his prerequisite to review derives added force when the jurisdiction of this Court is invoked to upset the decision of a State court." *North Dakota Pharmacy*, 414 U.S. at 159 (quoting *WOW*, 326 U.S. at 124).[7]

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[7] There are limited situations where the Court has found finality despite the need for further proceedings in the state

The Court of Appeal's decision does not satisfy this requirement. It is a pretrial ruling, not remotely "an effective determination of the litigation." At this point, Petitioner's ultimate liability is completely unknown. Indeed, it is not even known if *any* judgment ever will be entered against Petitioner based on the Court of Appeal's collateral estoppel ruling.

Nor would review by this Court now promote judicial economy. The issue, even as described by Petitioner, is not determinative of the litigation. At most, the Court could order a partial reversal. If the California courts did not reinstate their decision on another ground (*see* p. 8, n.4, above), Petitioner would still be bound by federal court findings that it was negligent in six different ways. There is simply no good reason for piecemeal review in this case.

Petitioner's only nod to finality is a citation to authorities holding that final disposition of a writ petition can satisfy the requirement. Pet. 2-3. But, the fact that Petitioner's pursuit of interlocutory review has concluded does not mean there is a final judgment. As shown above, there is no judgment effectively determining the litigation, and it cannot even be said that there ever will be.

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courts, *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), but this case is not one of them. *See O'Dell v. Espinoza*, 456 U.S. 430 (1981) (per curiam) (*Cox* exceptions not applicable. "Because the Colorado Supreme Court remanded this case for trial, its decision is not final 'as an effective determination of the litigation.' ") (quoting *Market Street Ry. Co. v. Railroad Comm'n*, above, 324 U.S. at 551).

The decision below is not final. Therefore, it is not subject to this Court's review.

IV. THE DECISION IS OF INTEREST ONLY TO THE PARTIES.

There is still another reason why this case does not meet the standards for review by this Court: the decision below is not "important;" it affects and is of interest only to the parties themselves. *See* Supreme Court Rule 10; *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955) (even after case argued and decided, certiorari dismissed as improvidently granted because Court does not sit for the benefit of particular litigants) (Frankfurter, J.); *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923) ("it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from the parties. . . . ").

The Court of Appeal declared that its opinion is "not for publication," App. 1, under the standards in California Rule of Court 976(b).[8] Clearly, the Court of Appeal did not believe it was rendering a decision of any great

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[8] Rule 976(b) provides:

> No opinion of a Court of Appeal . . . may be published in the Official Reports unless the opinion:
>
> (1) establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in published opinions, or modifies, or criticizes with reasons given, an existing rule;
>
> (2) resolves or creates an apparent conflict in the law;

importance. Moreover, the decision cannot be cited or relied on in any other case. *See* California Rule of Court 977(a) ("An opinion that is not ordered published shall not be cited or relied on by a court or a party in any other action. . . . ") While the unpublished character of the opinion is not an absolute bar to review, *e.g., Terrell v. Morris*, 493 U.S. 1, 3, 4 (1989) (per curiam), it shows that the decision matters only to the parties in this case; indeed, it does not even exist for anyone else.[9]

The decision below has no precedential effect, and is of no general import or interest. Therefore, it does not warrant this Court's attention.

V. THERE IS NO REASON TO GRANT THE WRIT.

A. No Conflict With A Decision of This Court.

Petitioner contends that the decision below conflicts with this Court's decision in *Stoll v. Gottlieb*, 305 U.S. 165, 170 (1938). Pet. 11-13. This contention misunderstands both *Stoll* and the decision below.

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(3) involves a legal issue of continuing public interest; or

(4) makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.

[9] The California Supreme Court had no interest in the issues. It denied review without even waiting for opposition to the Petition. Moreover, the underlying federal orders themselves did not present a question worthy of certification under 28 U.S.C. § 1292(b).

First, *Stoll* holds only that federal law governs the preclusive effect of federal judgments. It does not hold that state law must govern the preclusive effect of federal judgments rendered under state law.[10]

Second, even if *Stoll* held what Petitioner wishes it did, the state law in this case is that "California respects the final federal decision on the issue." App. 17. Petitioner simply does not come to grips with the fact that the state law it wants applied defeats it and supports the Court of Appeal's decision.

B. No Conflict In The Circuits To Review Here.

Petitioner also advises that there is a conflict among the federal circuit courts as to whether state or federal law governs the preclusive effect of a federal judgment rendered under state law. Pet. 13-16. That may be, but the conflict is not implicated by this case. As shown above, this case does not present that question, and there are numerous independent grounds supporting the decision regardless of the answer to the question. (pp. 4-11, above) There are also prudential (if not jurisdictional) reasons why this decision is not ripe or appropriate for this Court's review. (pp. 4-8, 11-14, above)

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[10] *Stoll* does cite *Dupasseur v. Rochereau*, 21 Wall. (88 U.S.) 130 (1875), for the proposition, but that ancient case was decided long before the adoption of the Federal Rules of Civil Procedure. The Court of Appeal correctly held that *Dupasseur* does not comport with modern law and would lead to contradictory results in cases like this one. App. 9-13.

The facts and circumstances of this case make Petitioner's conflict in the circuits a remote abstraction. If it were otherwise appropriate to address that conflict, this case is not at all the vehicle for doing it.

C. No *Erie v. Tompkins* Issue To Review.

The Petition seeks to raise an *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) issue that was not litigated or decided below. Pet. 16-19. Indeed, *Erie* was not so much as cited in any of the lower court decisions or orders. Therefore, the Court should decline to review this contention. *See Clark v. Jeter*, 486 U.S. 456, 459-60 (1988); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76-80 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549-50 (1987).

Petitioner's belated *Erie* argument is also meritless, for several reasons:

- the California Court of Appeal's decision rests on California law, so any applicable *Erie* principles are satisfied (pp. 4-8, above);
- the federal action here is not a diversity case, and hence it presents materially different issues from those raised in the federal circuit cases cited by Petitioner;
- most of the findings were made under federal law as well as under state law, so *Erie* principles don't apply to any of those findings (pp. 8-11, above); and

- according to the law review note Petitioner cites, the rule Petitioner complains of regarding finality for the purposes of the application of res judicata, is one of the issues that are "so trivial that they do not result in forum shopping or 'materially' alter the litigation." *See* Stuart D. Smith, Note, *Erie and the Preclusive Effect of Federal Diversity Judgments*, 85 Colum. L. Rev. 1505, 1522-23 (1985).

Petitioner offers no affirmative reason for the Court to grant the writ. It should be denied.

VI. THE COURT OF APPEAL'S DECISION IS SOUND IN ANY *EVENT.*

California chooses as a matter of California law to give collateral estoppel effect to a federal judgment even though the judgment is still subject to a possible appeal. No federal rule or principle precludes California from making that choice, and therefore there is no issue for this Court to review. (pp. 4-8, above)

Moreover, California's choice is wise, and the Court of Appeal's decision is sound. There is not even a need to review it to correct an "error."

The modern federal rule, *and the one that the California Supreme Court requires California Courts to apply as a matter of California law*, is that the preclusive effect of a federal judgment is determined by federal law " 'regardless of the nature of the case the federal court was deciding.' " *Empire Fire & Marine Ins. Co. v. J. Transport*, 880 F.2d 1291, 1293 n.2 (11th Cir. 1989) (quoting Charles A. Wright, *Law of Federal Courts* § 100A, at 696 (4th ed. 1983)).

The great majority of federal courts – and the most recent cases – have ruled this way. *See Johnson v. SCA Disposal Services*, 931 F.2d 970, 974 (1st Cir. 1991); *Gelb v. Royal Globe Insurance Co.*, 798 F.2d 38, 42 n.3 (2d Cir. 1986) (dictum), *cert. denied*, 480 U.S. 948 (1987); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989); *In re Air Crash at Dallas/Fort Worth Airport*, 861 F.2d 814, 816 (5th Cir. 1988); *Silcox v. United Trucking Service, Inc.*, 687 F.2d 848, 852 (6th Cir. 1982); *Petromanagement Corp. v. Acme-Thomas Joint Venture*, 835 F.2d 1329, 1333 & n.4 (10th Cir. 1988).[11]

The Restatement of Judgments announces the same rule. Section 87 provides: "Federal law determines the effects under the rules of res judicata of a judgment of a federal court." Restatement (Second) of Judgments § 87 (1982). This approach is favored by commentators as well.

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[11] The Ninth Circuit seems to take a slightly different approach that leads to the same result here. Under its approach, federal courts *sitting in diversity* must look to the law of the state in which they sit to determine the choice of law governing the preclusive effect of a prior federal judgment. *See Bates v. Union Oil Company of California*, 944 F.2d 647, 649 (9th Cir. 1991), *cert. denied*, 112 S.Ct. 1761 (1992). If the forum state is like California and requires application of federal law, then federal preclusion principles govern. *Id.* (applying federal law because Oregon, like Washington and California, would apply federal law to determine the preclusive effect of a prior federal judgment). As the Court of Appeal ruled below, California law looks to the federal rule, so the result is the same. *See Costantini v. Transworld Airlines*, 681 F.2d 1199, 1201 & n. 3 (9th Cir.), *cert. denied*, 459 U.S. 1087 (1982) (citing *Younger v. Jensen*, 605 P.2d 813, 822 (Cal. 1980) and *Levy v. Cohen*, 561 P.2d 252, 257 (Cal.), *cert. denied*, 434 U.S. 833 (1977)), *cert. denied*, 459 U.S. 1087 (1982) (Court applies federal preclusion law).

See, e.g., 18 Charles A. Wright, et al., *Federal Practice & Procedure*, § 4472, at 726 (1981); 1B James W. Moore, et al., *Moore's Federal Practice*, ¶ 0.410[1], at 362 (1992).

This rule is based on the principle of finality, which lies at the core of res judicata. As commentary to section 87 of the Restatement notes: "The principle of finality is an essential element of a court's authority" because it "express[es] the quality of a court's authority. . . . " Restatement (Second) of Judgments § 87, cmt. a, at 315 (1982). To put the matter plainly, a court cannot pretend to adjudicate matters if it does not have the inherent authority to ensure that its judgment is free from collateral attack by other courts. That is why on the issue of finality the Restatement adopts the position that federal law must govern. *Id.*, cmt. b, at 317 (since the question of a federal judgment's finality goes "to the essence of judicial function", the issue "should be determined by a federal rule").

The rule that Petitioner advocates would deprive the federal court of its authority to say whether its judgments were final. The effect of the rule would be to render a "final" federal judgment subject to collateral attack in state court. Our system of concurrent federal and state judicial systems cannot tolerate such a situation.

A corollary of Petitioner's rule is that parties who lose in federal litigation would have every incentive to challenge otherwise final federal judgments in subsequent state proceedings. That is precisely what Petitioner intends to do here. Its objective is *not* simply to relitigate issues that have already been decided; it also hopes to

undermine the findings in the federal action by obtaining contrary rulings in the state court action.

The purpose of res judicata is to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen v. McCurry*, 449 U.S. 90, 94 (1980). Those objectives are utterly thwarted by the position petitioner would have the Court adopt.

Nor is Petitioner correct in trying to attack the substance of the federal findings, and then speculating about the possible consequences if the findings were reversed.[12] To support its speculations, Petitioner cites the Wright and Miller treatise, Pet. 19 n.9, but immediately after the passage Petitioner quotes, the treatise solidly reaffirms the federal rule of finality of which Petitioner complains:

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[12] First, Petitioner erroneously suggests that the underlying federal court decision conflicts with *United States v. Montrose Chemical Corp.*, 788 F. Supp. 1485 (C.D. Cal. 1992). Pet. 18. The case is easily distinguished. In *Montrose*, the State asserted only exclusively federal CERCLA claims, and the court held that defendant's counterclaims were limited to recoupment. *Id.* at 1489-90. In the federal action here, Petitioner affirmatively asserted a number of state-law claims, including common law nuisance. That clearly waived its Eleventh Amendment immunities to counter claims based on similar state-law theories.

Second, Petitioner suggests its arguments are meritorious because the Ninth Circuit called them "plausible." Pet. 18 n.8. But that was in the context of finding the arguments were not so frivolous as to warrant sanctions. As the court below held: "We do not believe the State can take much comfort from this ruling. In our view 'plausible' is a word which invites suspicion." App. 23 n.13.

> So long as the second court is determined to press on to judgment pending appeal in the prior action, it remains necessary to answer the res judicata question. Most courts adhere to the answer established in the federal decisions. Despite the manifest risks of resting preclusion on a judgment that is being appealed, *the alternative of retrying the common claims, defenses, or issues is even worse. All of the values served by res judicata are threatened or destroyed by the burdens of retrial, the potential for inconsistent results, and the occasionally bizarre problems of achieving repose and finality that may arise.*

18 Charles A. Wright, et al., *Federal Practice & Procedure* § 4433, at 313 (1981) (emphasis added) In short, Petitioner's speculative complaints about the federal decision and the rule of finality are neither relevant nor well taken.

The Court of Appeal's decision furthers the purposes of finality and federalism and avoids the mischief Petitioner urges. There is no reason to review that decision.

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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McCUTCHEN, DOYLE, BROWN & ENERSEN
Of Counsel

October 14, 1992

RULE 29.1 LIST

APPENDIX A

Each corporate Real Party member of the Newman Coordinating Committee submits the following Rule 29.1 information:

Alcan Aluminum Corporation:

Parent: Alcan Aluminum Corporation is a wholly-owned subsidiary of Alcan Aluminum, Ltd. headquartered in Montreal (Quebec) Canada

Subsidiaries and/or Affiliates:

Alanx Holdings, Inc.
  Alanx Products Company, LP
Alcan Management Services U.S.A. Inc.
Alcan-Sumitomo Electric, Inc.
Alcan-Toyo America, Inc.
Alupower, Inc.
Ampersand Corporate Spinoff Ventures
  Limited Partnership
Ampersand Corporate Spinoff Ventures II
  Limited Partnership Blanx Holding, Inc.
  Blanx Products Partnership
Cyberdisk, Inc.
Erieview Cartage, Inc.
Kroy Industries Corporation
LDC Holdings, Inc.
LTC Holdings, Inc.
  Lanxide Technology Company, LP
Logan Aluminum, Inc.

Manufacturing Laboratories, Inc.
Phoenix Equipment Company
Rapak, Inc.
Sol-Gel Ceramic Products, Inc.
The Aluminum Rail Car Company Partnership (TARCO)

The Deutsch Company:

Parent: None

Subsidiaries and/or Affiliates: None

McDonnell Douglas Corporation:

Parent: None

Subsidiaries and/or Affiliates:

Finnish American International Trade, Inc.
Network Information Services Co., Limited

Montrose Chemical Corporation of California:

Parent: None

Subsidiaries and/or Affiliates:

Chris Craft Industries, Inc.
Stauffer Management Company

NI Industries, Inc.:

Parent: Masco Industries, Inc.

Subsidiaries and/or Affiliates:

NI West, Inc.

Northrop Corporation:

Parent: None

Subsidiaries and/or Affiliates:

Northrop Overseas Services Limited
Northrop Services Arabic Limited
Vought Holding Company
LPV Aircraft Company

Quantum Chemical Corporation:

Parent: None

Subsidiaries and/or Affiliates:

Atlantic Energy, Inc.
CUE Insurance Limited
Fallon Propane and Butane Company
Northwest L.P.G. Supply Ltd.
Quantum Chemical Europe B.V.
Qauntum Petrochemical Corporation Limited
Petrolane Finance Corp.
Petrolane Gas Service L.P.
Petrolane Incorporated

Quemetco, Inc.

Parent: RSR Corporation

Subsidiaries and/or Affiliates: None

Rainbow Canyon Manufacturing Company:

Parent: None

Subsidiaries and/or Affiliates: None

Rockwell International Corporation:

Parent: None

Subsidiaries and/or Affiliates:

Allen-Bradley Electronics Limited (England)
Allen-Bradley Enterprise Xiamen Ltd. (China)
Allen-Bradley (Hong Kong) Limited
Allen-Bradley India Limited (India)
Allen-Bradley International Limited (England)
Allen-Bradley Limited (England)
Allen-Bradley (N.Z.) Ltd.
Allen-Bradley (Overseas) Limited (England)
Allen-Bradley/Stromberg, Inc.
Allen-Bradley Technical Services Limited
Automotive Axles Limited (India)
Camden Investment Trust, Limited (England)
Constantine Insurance Company, Ltd. (Bermuda)
Controlmatic Allen-Bradley, S.A. de C.V.
Dirona, S.A. (Mexico)
Dynapro Systems, Inc. (B.C. Canada)
Ege Fren Sanayii Ve Ticaret A.S.
Ege Brakes Industrial Trading Co. Ltd. (Turkey)
Electrica Allen-Bradley, S.A. de C.V. (Mexico)
Electronics Corporation of America (Gr. Britain) Limited
F.A.S.E. - Forniture Automasiione e Strumentasione Elettrica S.p.A. (Italy)
Freios Master Equipamentos Automotivos Limitada (Brazil)
Hall Processing Systems

Hyundai A-B Ltd.
Industrias Erlo, S.A. de C.V.
Korea A-B Ltd.
Logicos-Sistemas De Controle Industrial Ltda (Brazil)
Mainstream Software Corporation
Manufacturers Leasing Associates XXXV (Brazil)
Metal Leve Allen-Bradley Sistemas Industrias Ltda.
Moligal Produtora De Assentos De Automovel, Limitada (Portugal)
M.P. O'Rourke Pty., Limited (Australia)
Nippon Bodei Sisutemuzu Kabushiki-Kaisha
Osai A-B Limited
Robotics Research Corporation
Rockwell Assemblies Ltd.
Rockwell Automotive Body Systems (U.K.) Limited
Rockwell Automotive (U.K.) Limited
Rockwell Braseixos S.A.
Rockwell Charitable Trustees Limited
Rockwell Clutch Co.
Rockwell Collins De Mexico, S.A.
Rockwell-Collins France S.A.
Rockwell-Collins (U.K.) Limited
Rockwell International Limited
Rockwell International Pension Trustees Limited
Rockwell International Suspension Systems Company
Rockwell International Taiwan Company, Ltd.
Rockwell PMC Limited
Rockwell Printing Machiner PLC
Rockwell Systems Australia Pty. Ltd.

Rockwell Standard of Australia Limited
Rockwell Switching Systems Limited
Rockwell Thompson Limited
Rockwell U.K. Limited
Rockwell Wabco Vehicle Control Systems
Rostone Europe Limited (England)
Ruedas De Venezuela, S.A.
Rockwell International Suspension Systems Company, U.S.
Rubery Owen-Rockwell Italia S.r.l. (Italy)
SCI Aux Pres Renard (France)
S.C.I. De Sully Sur Loire (France)
Silvant Plastics Limited
Tamet Compania Anonima (Venezuela)
TBR Co., Ltd. (Japan)
Tyseley Estates Limited (England)
Wilmot Breeden Employees Trust Limited (England)
Wilmot Breeden Group Properties Limited
Wilmot Breeden (Holdings) Limited (England)
Wilmot Breeden (Pressings) Limited (England)

Rohr, Inc.:

Parent: None

Subsidiaries and/or Affiliates:

Rohr Europe S.A.
Rohr Aero Service Europe
RII Services, Inc.
Transportation Insurance Ltd.
Tortuga Casualty Co.
United Insurance Co.
Wrensford Insurance Co. Ltd.